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No. 1014

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

ETHEL S. GARRETT and GEORGE A. GARRETT,
Petitioners,

v.

DISTRICT OF COLUMBIA, *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF IN OPPOSITION

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DIVISION OF PRINTING AND PUBLICATIONS—GOVERNMENT OF THE DISTRICT OF COLUMBIA

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SUMMARY OF ARGUMENT

This case does not present any of the questions upon which this Court ordinarily grants a writ of certiorari. The case involves only the question of the reasonableness of a classification

for tax purposes made by the Congress in the exercise of its exclusive power to legislate for the District of Columbia.

The provisions of the Fourteenth Amendment, including the equal protection clause, being directed to the states, do not apply to the District of Columbia. The Fifth Amendment does apply to the District of Columbia but contains no equal protection clause. With one exception, no tax statute enacted by Congress has been declared to be in violation of the Fifth Amendment because of classification.

When legislative classification is the subject of review by the courts, there is a presumption of the existence of facts underlying constitutionality.

ARGUMENT

1. The petition should be denied.

This Court has stated that it will not ordinarily review decisions of the United States Court of Appeals for the District of Columbia which are based upon statutes limited in their operation to the District of Columbia. *District of Columbia* v. *Pace,* 320 U. S. 698, 702, 64 S. Ct. 33, 88 L. Ed. 408; *Del Vecchio* v. *Bowers,* 296 U. S. 280, 285, 56 S. Ct. 190, 80 L. Ed. 229. The statute involved in the case at bar, like the one involved in *District of Columbia* v. *Pace, supra,* is limited in its operation to the District of Columbia.

Rule 38, par. 5(c) of the Revised Rules of this Court indicates the character of the reasons for which a review on writ of certiorari will be granted. Applying those reasons to the instant case, it is obvious that no question of general importance is involved. It seems equally certain that the case does not involve any question of substance relating to the construction or application of the Constitution, or a treaty or statute, of the United States, which has not been, but should be, settled by this Court. True it is, of course, that the

statute involved was, as are all statutes in force and effect in the District of Columbia, enacted by the Congress of the United States in the exercise by that body of the power expressly delegated to it by Article I, Section 8, Clause 17 of the Constitution. In that sense only was the Congress acting as a legislature of national character. *Cohens* v. *Virginia*, 19 U. S. 262, 6 Wheat. 264, 5 L. Ed. 257. But the fact remains that the statute in question is not national in its operation.

This case does not involve any situation where the United States Court of Appeals for the District of Columbia has failed to give proper effect to an applicable decision of this Court. *Heiner* v. *Donnan*, 285 U. S. 312, 52 S. Ct. 358, 76 L. Ed. 772, upon which petitioners apparently rely for their contention to the contrary, is not applicable to the instant case, as will hereinafter be shown.

2. The statute involved is valid.

The whole theory of petitioners' contentions may be summarized in this manner:

> Section 6(a) of the District of Columbia Income Tax Act (Pet. for Writ of Cert., p. 3) defines capital assets as property, other than stock in trade etc., held by the taxpayer for more than two years, and excludes gain or loss from the sale or exchange of such assets from the computation of net income for tax purposes. Section 6(b) of the same Act (Pet. for Writ of Cert., p. 3) provides that gain or loss from the "sale or exchange of property other than a capital asset shall be treated in the same manner as other income or deductible losses".
>
> Thus, under those two sections of the statute gains from the sale or exchange of property held for two

> years or less are subject to tax. The tax in controversy was assessed upon the gain from the sale of securities held by these petitioners for less than two years.
>
> Petitioners say that this results in discrimination, for which "there is * * * no rational basis", and that "the consequence is an invalid discrimination against taxpayers such as petitioners." (Brief in Support of Petition, p. 14). They contend, more specifically, that "The requirement that property be held for more than two years, in order to be recognized as a capital asset and as such immune from tax on sale, is, * * * arbitrary, unreasonable and contrary to fact, and therefore invalid under the Fifth Amendment of (sic) the Constitution as applied by this Court in numerous decisions, including particularly *Heiner* v. *Donnan*, 285 U. S. 312, 52 S. Ct. 358, 76 L. Ed. 772; cf. *Louisville Gas & Electric Co.* v. *Coleman*, 277 U. S. 32, 37-39, 48 S. Ct. 423, 72 L. Ed. 770." (Brief in Support of Petition, p. 10).

Heiner v. *Donnan, supra*, is no authority for declaring Section 6(a) invalid in part or in *toto*, because the ruling in that case, holding invalid a Federal statute conclusively defining transfers made within two years of death as transfers in contemplation of death, appears to have been predicated upon the premise that such conclusive presumption created a rule of substantive law which the taxpayer was unable to rebut as distinguished from a rule of evidence which would have the effect of shifting the burden of proof. Insofar as Section 6(a) of the District Act is concerned, the definition therein does not create an irrebuttable rule of substantive law; it merely states what are and what are not to be considered capital assets in the computation of the tax. The two-year holding period in the definition in Section 6(a) is not the only qualification. In order for a taxpayer to take advantage of the "non-imposition" of a tax on, "exemption" of, or non-recognition of, gains from the sale of any property held by him it

must not only appear, affirmatively, that he has held the property for more than two years but, negatively, (1) that the property is not stock in trade or other property of a kind which would properly be included in the inventory of a taxpayer if on hand at the close of the taxable year and (2) that it is not property held by the taxpayer primarily for sale to customers in the ordinary course of the taxpayer's trade or business. It is true that with respect to property held less than two years the statute provides that such property shall not be considered "capital assets". All property sold must fall within the category of "a capital asset" or of "property other than a capital asset". If the property sold comes within the definition of "a capital asset", the amount realized from the sale will not be taxed and likewise, any loss resulting from the sale will not be recognized. On the other hand, if the property sold comes within the definition of "property other than a capital asset", the amount realized from the sale will be taxed or any loss resulting from the sale will be allowed as a deduction. Thus the taxpayer, if his property be such as meets the two negative qualifications of "capital assets" in the statute, has it in his power to meet the other qualification, and thus to have his property considered as a "capital asset" by holding it for more than two years before selling. Therefore Section 6(a) does not in fact deprive taxpayers of property without due process of law; it merely furnishes a guide to all taxpayers as to how they may bring the sales of their property within or without the statute as they wish. This is a "far cry" from the statute involved in the *Heiner* case. Once a taxpayer had made a transfer of his property before death, he could not controvert the conclusive presumption in the statute involved because he could not prolong his life for more than two years from the date of such transfer if it should happen to be his destiny to die within two years from such date.

The statute involved in *Louisville Gas & Electric Co.* v. *Coleman, supra,* was held by this Court to be void under the

equal protection clause of the Fourteenth Amendment to the Constitution. And the Fourteenth Amendment does not apply to the District of Columbia since that amendment is directed to the states. *Wight* v. *Davidson*, 181 U. S. 371, 21 S. Ct. 616, 45 L. Ed. 900. The Fifth Amendment, which does apply to the District of Columbia, contains no equal protection clause. Moreover, under the Fourteenth Amendment:

> "* * * even the states, though subject to such a clause, are not confined to a formula of rigid uniformity in framing measures of taxation. * * * They may tax some kinds of property at one rate, and others at another, and exempt others all together. * * * If this latitude of judgment is lawful for the states, it is lawful, *a fortiori*, in legislation by the Congress, which is subject to restraints less narrow and confining. * * *" *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 584, 57 S. Ct. 883, 81 L. Ed. 1279.

In his dissenting opinion as an Associate Justice in *Heiner* v. *Donnan*, *supra*, the late Chief Justice Stone pointed out that:

> "No tax has been held invalid under the Fifth Amendment because based on an improper classification, and it is significant that in the entire one hundred and forty years of its history, the only taxes held condemned by the Fifth Amendment were those deemed to be arbitrarily retroactive. See *Nichols* v. *Coolidge*, 274 U. S. 531; *Untenmyer* v. *Anderson*, 276 U. S. 440; *Coolidge* v. *Long*, 282 U. S. 582."

In the instant case, as in all cases where legislative classification is the subject of review by the courts, there is a presumption of the existence of facts underlying constitutionality, and the burden is on petitioners to establish that there could have been no reasonable basis for the selection made by Congress in Section 6(a) of the District of Columbia Income Tax Act, *supra*. *Sinking-fund Cases*, 99 U. S. 700, 718, 25 L. Ed.

; *Nicol* v. *Ames*, 173 U. S. 509, 514, 43 L. Ed. 786, 19 S. Ct. ; *Butterfield* v. *Strannahan*, 192 U. S. 470, 492, 48 L. Ed. , 24 S. Ct. 349; *Hardware Dealers Mut. Fire Ins. Co.* v. *dden Co.*, 284 U. S. 151, 158, 76 L. Ed. 214, 52 S. Ct. 69; *tropolitan Co.* v. *Brownell*, 294 U. S. 580, 584, 79 L. Ed. 0, 55 S. Ct. 538.

Regardless of the reasons underlying the enactment of the ital gains and losses provisions of the Federal Revenue Act 1921 (see *Helvering* v. *New York Trust Co.*, 292 U. S. 455, , 54 S. Ct. 806, 809, 78 L. Ed. 1361), it seems clear, as the urt below stated, that in enacting Sections 6(a) and 6(b) the District Act:

> "* * * The apparent purpose of Congress was to distinguish, for tax purposes, between investment and speculation. We cannot say that this is an unreasonable purpose, or that the minimum period of two years has no tendency to promote it, or even that a different minimum period would promote it more effectively. 'It is common knowledge that stocks and bonds held for more than two years are more likely to have been acquired for investment than those turned over sooner * * *.' *Davis* v. *United States*, 87 F. 2d 323, 325 (C. C. A. 2d) * * *." Cert. denied 301 U. S. 704, 57 S. Ct. 937, 81 L. Ed. 1359 (R. 12).

Respondent submits that Section 6(a) is, in every separate ovision and in *toto*, of indubitable validity under the au- ority of *Steward Machine Co.* v. *Davis, supra*; *Brushaber* v. *nion Pacific R. Co.*, 240 U. S. 1, 60 L. Ed. 493, 36 S. Ct. 236; *itizens Telephone Co.* v. *Fuller*, 229 U. S. 322, 57 L. Ed. 1206, S. Ct. 833; *Quong Wing* v. *Kirkendall*, 223 U. S. 59, 56 L. l. 350, 32 S. Ct. 192; *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107, L. Ed. 389, 31 S. Ct. 342; *Cook* v. *Marshall County*, 196 S. 261, 49 L. Ed. 471, 25 S. Ct. 233; *Neild* v. *District of Co- mbia*, 71 App. D. C. 306, 110 F. 2d 246; and *Fessler* v. *Com- issioner* (CCA-7), 38 F. 2d 155 (1930), cert. den. 281 U. S. 5, 74 L. Ed. 1165, 50 S. Ct. 409.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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